102

Supreme Court, U.S.
FILED

08-227 AUG 21 2008

OFFICE OF THE CLERK

(1)

No.

In the Supreme Court of the United States

ANTONIO RAY LIDDELL,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAN M. KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

QUESTION PRESENTED

Whether the possibility that police officers will come across a dangerous object during a search, when that object poses no immediate threat to the safety of the officers or the public, triggers the "public safety" exception to *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that was recognized by this Court in *Quarles* v. *New York*, 467 U.S. 649 (1984).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 6

I. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER THE PUBLIC SAFETY EXCEPTION COMES INTO PLAY ONLY WHEN QUESTIONING IS NEEDED TO AVOID AN IMMEDIATE THREAT TO THE SAFETY OF THE PUBLIC OR OF LAW ENFORCEMENT OFFICIALS 7

A. Three Circuits Require A Need For Immediate Questioning To Justify Interrogating Suspect Who Has Been Taken Into Custody But Has Not Received Miranda Warnings 8

B. In Contrast, Three Circuits, Including the Court Below, Allow Officers To Question An Arrested Suspect Without Giving Miranda Warnings Whenever Officers May Be Subject To A Future Danger 11

TABLE OF CONTENTS—continued

Page

II. THE DECISION BELOW DEPARTS FROM *QUARLES*, WHICH RECOGNIZED A LIMITED EXCEPTION TO *MIRANDA* THAT APPLIES WHEN THERE IS AN IMMINENT DANGER AND IMMEDIATE NEED FOR QUESTIONING 13

CONCLUSION 18

APPENDIX A: Opinion Of The United States. Court Of Appeals For The Eighth Circuit, February 25, 2008 ..... A-1

APPENDIX B: Order Of The United States District Court For The Southern District Of Iowa, January 9, 2006 ..... B-13

APPENDIX C: Order Of The United States Court Of Appeals For The Eighth Circuit, April 23, 2008 ..... C-23

TABLE OF AUTHORITIES

Page(s)

CASES

Dickerson v. *United States*,
530 U.S. 428 (2000) 17

Fischer v. *United States*,
425 U.S. 391 (1976) 17

Matter of John C.,
519 N.Y.S.2d 223 (N.Y. App. Div. 1987) 8

Miranda v. *Arizona*,
384 U.S. 436 (1966) ..... *passim*

Orozco v. *Texas*, 394 U.S. 324 (1969) 15, 16, 17

Quarles v. *New York*, 467 U.S. 649 (1984) ..... *passim*

State v. *Hendrickson*,
584 N.W.2d 774 (Minn. Ct. App. 1998) 8

State v. *Stephenson*,
796 A.2d 274 (N.J. Super. App. Div. 2002) 8

United States v. *Brathwaite*,
458 F.3d 376 (5th Cir. 2006) 11

United States v. *Fox*,
393 F.3d 52 (1st Cir. 2004), vacated on
other grounds, 545 U.S. 1125 (2005) 12

United States v. *Jefferson*, No. 2:07-CR-311-
WKW, 2008 WL 1848798
(M.D. Ala. April 24, 2008) 7

United States v. *Jones*, 154 F.Supp.2d 617
(S.D.N.Y. 2001) 7

United States v. Luker, 395 F.3d 830,
832 (8th Cir. 2005), cert. denied,
546 U.S. 831 (2005) 5, 6, 12

United States v. *Melvin*, 2007 WL 2046735
(4th Cir. July 13, 2007) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. *Mobley*,
40 F.3d 688 (4th Cir. 1994) 8

United States v. *Phillips*,
94 Fed. Appx. 796 (10th Cir. 2004) 13

United States v. *Raborn*,
872 F.2d 589 (5th Cir. 1989) 10, 11

United States v. *Williams*,
483 F.3d 425 (6th Cir. 2007) 8, 10

MISCELLANEOUS

BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, CONTACTS BETWEEN THE POLICE AND THE PUBLIC 2005 at 6, http://www.ojp.gov/bjs/pub/pdf/cpp05.pdf. 17

NATIONAL RIFLE ASSOCIATION OF AMERICA, INSTITUTE FOR LEGISLATIVE ACTION, MORE GUNS, LESS CRIME (Sept. 28, 2007), http://www.nraila.org/ Issues/ Fact-Sheets/Read.aspx?id=206 17

TOM W. SMITH, PUBLIC ATTITUDES TOWARDS THE REGULATION OF FIREARMS at Fig. 2 (March 2007), http://www-news.uchicago.edu/ releases/ 07/pdf/070410.guns.norc.pdf 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Antonio Ray Liddell, respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, (App., *infra*, 1a-11a), is reported at 517 F.3d 1007. The opinion of the district court, (App., *infra*, 12a-21a), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on Feb. 25, 2008. A timely petition for rehearing and rehearing en banc was denied on April 23, 2008. App, *infra*, 22a. On July 14, 2008, Justice Alito extended the time for filing a petition for a writ of certiorari until Aug. 21, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall be * * * compelled in any criminal case to be a witness against himself.

STATEMENT

The requirement that police officers inform suspects of their right to remain silent before interrogating them is a settled feature of our criminal justice system: "[t]he Fifth Amendment privilege is so fundamental to our system of constitutional rule" that "if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain si-

lent." *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966). Without being made aware of that right, individuals cannot make "an intelligent decision as to its exercise." *Id.* at 468.

Insofar as is relevant in this case, the Court has made clear that police officers will be excused from the "[simple] expedient of giving an adequate warning" (*Miranda*, 384 U.S. at 468) only if they find themselves "in a situation posing a threat to the public safety." *New York v. Quarles*, 467 U.S. 649, 657 (1984). This "public safety exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence" applies in a very "narrow" range of circumstances. *Id.* at 655, 658. In *Quarles*, officers "were confronted with the immediate necessity of ascertaining the whereabouts of a gun" that the defendant had just discarded in a busy supermarket. The Court reasoned that in such an emergency situation, it would be "untenable" to require officers to choose "in a matter of seconds" between foregoing the *Miranda* warning at the cost of future admissibility of the suspect's statements, or issuing the warning so as to preserve admissibility while undermining their ability to "neutralize the volatile situation confronting them." *Id.* at 657-58. To avoid such "on-the-scene balancing" dilemmas, the Court made clear that the public safety exception applies to questioning that relates to the "exigency which justifies" its application: officers may ask only those questions "necessary to secure their own safety or the safety of the public." *Id.* at 658-59.

In this case, the Eighth Circuit held the public safety exception recognized in *Quarles* to apply in very different circumstances: when police officers asked a suspect they had taken into custody whether

they might find something dangerous in an automobile that had been secured and was accessible neither to the suspect nor to the public. In doing so, as Judge Gruender noted below, the court of appeals effectively held that law enforcement officers may disregard *Miranda* prior to conducting almost any search, thus "stray[ing] from the Supreme Court's tethering of the exception to the existence of exigent circumstances." App., *infra*, 6a. That holding also exacerbated a growing conflict in the courts of appeals on the question; as Judge Gruender also noted, "[a]lthough the First Circuit agrees with our precedents, three other circuits do not." *Id.* at 10a. Further review by this Court, to resolve this conflict and provide much-needed guidance on the application of the public safety exception to *Miranda*, accordingly is warranted.

1. Police Officer Michael Adney stopped petitioner's vehicle in the early morning hours of August 18, 2005, for a noise violation. App., *infra*, 2a, 12a-13a. After speaking with petitioner and running a name check, Officer Adney determined that petitioner was barred from driving in Iowa and took him into custody. App., *infra*, 12a. Officer Adney searched petitioner before handcuffing him and placing him in the back of the squad car. App., *infra*, 13a.

Minutes later, Officer John Melvin arrived and assisted in searching petitioner's vehicle; Officer Adney continued to speak with petitioner. App., *infra*, 2a, 13a. During the search, Officer Melvin found an unloaded revolver under the driver's seat. App., *infra*, 2a, 13a. The officers stepped aside and discussed charging petitioner with carrying a concealed weapon. App., *infra*, 14a. They instead had petitioner, still handcuffed, exit the squad car. App., *in-*

fra, 2a, 14a. Although the officers had not read petitioner his *Miranda* rights, they began questioning him. App., *infra*, 2a, 14a.

Officer Adney asked: "Is there anything else in there we need to know about?" Before petitioner could respond, Officer Melvin interjected, "That's gonna hurt us?" Officer Adney then echoed, "That's gonna hurt us? Since we found the pistol already." Petitioner responded that "I knew it was there but * * * it's not mine," before telling the officers that there were no other weapons in his car. App., *infra*, 2a. The officers then patted petitioner down again and placed him back into the squad car. Petitioner's vehicle was subsequently transported to the police station where it was again searched. App., *infra*, 15a.

2. Petitioner, charged with being a felon in possession of a firearm, filed a motion to suppress his response to the officers' pre-*Miranda* questioning. Because he had not been advised of his *Miranda* rights, petitioner argued that his statement was obtained in violation of the Fifth Amendment.

The district court denied petitioner's motion to suppress, holding that the public safety exception to *Miranda* applies when police officers obtain a piece of information that "takes the facts outside of the routine and ordinary arrest scenario." App., *infra*, 17a. In the district court's view, discovery of the firearm was just such information, triggering the exception; the court believed that the firearm provided the officers with an objectively reasonable concern for their safety, which in turn warranted questioning prior to issuance of *Miranda* warnings. *Id.* at 19a-20a. After the district court denied his motion to

suppress, petitioner entered a conditional guilty plea. App., *infra*, 2a.

3. The Eighth Circuit affirmed, holding that the officers' questioning of petitioner fell within the public safety exception to *Miranda*. App., *infra*, 1a-11a. The court acknowledged that, at the time of the interrogation, petitioner "was handcuffed and under the control of the two officers, and there were no passengers or nearby members of the public who could have accessed or been harmed by the contents of [petitioner]'s car." *Id.* at 4a. Nevertheless, the court reasoned that "the risk of police officers being injured by the mishandling of unknown firearms or drug paraphernalia provides a sufficient public safety basis to ask a suspect who has been arrested and secured whether there are weapons or contraband in a car or apartment that the police are about to search." *Id.* at 5a (citing *United States v. Luker*, 395 F.3d 830, 832 (8th Cir. 2005), *cert. denied*, 546 U.S. 831 (2005)). The court concluded that, "when the officers found [petitioner's] concealed .38 caliber revolver, they had good reason to be concerned that additional weapons might pose a threat to their safety when they searched [petitioner's] car incident to a late-night arrest." *Ibid.*

In reaching its conclusion, the panel relied on *Luker* for the proposition that the "public safety exception applie[s] to post-arrest question[ing]" regarding whether "the police should know about" any objects in a driver's car. App., *infra*, 5a (citing *Luker*, 395 F.3d at 832). Judge Heaney had dissented in that case, reasoning that the public safety exception should apply only if the officers' "questions [are] necessary to secure the safety of officers or the public." 395 F.3d at 834. Judge Heaney concluded that application of the public safety exception, when the de-

fendant was arrested and handcuffed and no third parties posed any threat, would "expand the public safety exception far beyond its original scope." *Id.* at 835. Thus, he would have "reverse[d] the district court and f[ou]nd that Luker's statement d[id] not fall within the public safety exception." *Id.*

In this case, Judge Gruender concurred separately. App., *infra*, 5a-11a. Like Judge Heaney, he would have "conclude[d] that the public safety exception to *Miranda* would not apply because there is no evidence that an immediate danger existed." App., *infra*, 11a. In Judge Gruender's view, "the public safety exception to *Miranda* applies only when (1) an immediate danger to the police officers or the public exists, or (2) when the public may later come upon a weapon and thereby create an immediately dangerous situation." *Id.* at 9a. Here, the record established that there was neither an emergency nor any third parties who might have come upon a hypothetical second weapon. *Ibid.* To be sure, Judge Gruender reasoned, "the search of a vehicle that potentially contains a loaded weapon may well be inherently dangerous, [but] the record does not establish that any immediate danger" justified foregoing the *Miranda* warning. *Ibid.* Because Judge Gruender felt constrained by the Eighth Circuit's prior decision in *Luker*, he concurred in the panel's decision. *Id.* at 11a He noted, however, that the court's holding conflicted with decisions of the Fourth, Fifth, and Sixth Cicuits. *Id.* at 10a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's holding represents an unwarranted expansion of the *Quarles* public safety exception to *Miranda*'s requirements. The decision below is inconsistent with *Quarles* because, in circum-

stances like those in this case, there is no immediate threat to public safety that would have required the arresting officers to undertake the sort of "on-the-scene balancing" that the *Quarles* Court sought to avoid. And the holding below dramatically undermines *Miranda* because virtually *every* search conducted by police officers involves the possibility of discovering a dangerous item and thus, according to the Eighth Circuit's holding, the "public safety" exception could apply to virtually every interrogation preceding a search. This significant expansion of the public safety exception to *Miranda* finds no support in the rationale for that rule. It therefore is not surprising that, although several courts of appeals agree with the approach taken below, at least three others have rejected it. Because this issue is one of great practical importance that arises frequently, this Court should grant review.

I. The Courts Of Appeals Are Divided On Whether the Public Safety Exception Comes Into Play Only When Questioning Is Needed To Avoid An Immediate Threat To the Safety Of The Public Or Of Law Enforcement Officials.

This case involves a widely acknowledged conflict in the circuits on the scope of the public safety exception to the *Miranda* requirement. In fact, "[a]pplying the public safety exception in the Fifth Amendment context where the defendant is already in handcuffs and is secure has presented a greater problem than th[is] Court predicted." *United States* v. *Jefferson*, No. 2:07-CR-311-WKW, 2008 WL 1848798 at *7 (M.D. Ala. April 24, 2008). See *United States* v. *Jones*, 154 F. Supp. 2d 617, 628 (S.D.N.Y. 2001) (courts have taken "divergent approaches to deter-

mining the breadth of the public safety exception"). That confusion warrants the Court's attention.

A. Three Circuits Require A Need For Immediate Questioning To Justify Interrogating Suspect Who Has Been Taken Into Custody But Has Not Received *Miranda* Warnings.

As Judge Gruender stated in his concurring opinion below, the Fourth, Fifth, and Sixth Circuits have held that the public safety exception to the *Miranda* requirement is *not* triggered by a police officer's fear of mishandling firearms, drug paraphernalia, or other dangerous items during a search under circumstances similar to those in this case.[1]

1. The decision below cannot be reconciled with the Fourth Circuit's holding in *United States* v. *Mobley*, 40 F.3d 688 (4th Cir. 1994). There, the court considered a situation in which officers were about to search the defendant's apartment. The apartment had already been secured and there were no third parties in the vicinity. An officer asked the defendant whether "there was anything in the apartment that could be of danger to the agents who would be staying to conduct the search warrant, such as a weapon." *Id.* at 691. The defendant confirmed that there was a weapon in the apartment and was later convicted on the basis of his statement. On appeal,

---

[1] The Eighth Circuit majority itself acknowledged the conflict with the Sixth Circuit. See App., *infra*, at 5a (citing *United States* v. *Williams*, 483 F.3d 425 (6th Cir. 2007)). Its opinion additionally conflicts with three state intermediate appellate court decisions. See *State* v. *Stephenson*, 796 A.2d 274, 281 (N.J. Super. Ct.App. Div. 2002); *State* v. *Hendrickson*, 584 N.W.2d 774 (Minn. Ct. App. 1998); *Matter of John C.*, 519 N.Y.S.2d 223 (N.Y. App. Div. 1987).

the Fourth Circuit reversed the conviction, declining to apply the public safety exception "[a]bsent an objectively reasonable concern for immediate danger to police or public." *Id.* at 693. Noting that nothing "separate[d] the[] facts [of that case] from those of an ordinary and routine arrest scenario" (*ibid.*), the court rejected the government's argument that the risk of encountering a firearm during the course of the search constituted a threat to the public safety. *Ibid.*

The Fourth Circuit more recently confirmed that rule in *United States* v. *Melvin*, 2007 WL 2046735, at *11 (4th Cir. July 13, 2007), holding that the government must "demonstrate an immediate need that would validate protection under the *Quarles* exception." Therefore, when the *Melvin* court was presented with facts essentially identical to the situation in this case, it held that the public safety exception did not apply. One of the defendants in *Melvin* was arrested outside his apartment, shortly after police seized and began towing his truck, which was parked outside. After the defendant was arrested, but before he was given *Miranda* warnings, officers asked "if there was 'anything the agents needed to know about in the truck.'" *Id.* at *8. Although the officers in *Melvin*, like the officers here, faced the danger of coming across hidden weapons during a search of the car, the Fourth Circuit held the *Quarles* exception inapplicable. Indeed, the *Melvin* court suggested that the danger of coming upon a weapon during a search can never be sufficient on its own to trigger the public safety exception. *Id.* at *11 ("[T]he government did not admit evidence that the public had access to the impound lot so as to create a public danger. In the absence of such evidence, we are con-

strained to conclude that [the defendant's] * * * statements were improperly admitted.").

2. The Eighth Circuit's decision also conflicts with the Sixth Circuit's holding in *United States* v. *Williams*, 483 F.3d 425 (6th Cir. 2007). As in *Mobley*, officers in *Williams* entered the suspect's apartment and questioned him after he was no longer free to leave. They asked "if anybody else was in the room and if he had any weapon." *Id.* at 427. The court held the defendant's response, identifying the location of a gun, inadmissible, reasoning that "[t]he public safety exception applies if and only if" an officer has "a reasonable belief that he is in danger" because, "at minimum," (1) "the defendant might have (or recently have had) a weapon, and (2) * * * someone other than police might gain access to that weapon and inflict harm with it." *Id.* at 428. The court remanded the matter for the trial court to determine whether "someone other than police could access the weapon and inflict harm with it." *Id.* at 429. The Sixth Circuit's holding that the public safety exception applies if and only if a third party might "gain access to [a] weapon and inflict harm with it" cannot be reconciled with the decision below.

3. Finally, the panel's holding also conflicts with the Fifth Circuit's decision in *United States v. Raborn*, 872 F.2d 589 (5th Cir. 1989). There, the court considered a case with facts very similar to those in this case. Police officers had safely arrested the defendant during a traffic stop and there were no third parties on the scene. The officers believed the defendant had a weapon in his truck and, without issuing a *Miranda* warning, questioned him about the location of the gun. In response, the defendant admitted to having an illegal firearm in his truck. He was later convicted as a felon in possession and

sought to suppress both the statement and the weapon, which the government argued were admissible under *Quarles*. The court concluded:

> Unlike the situation in *Quarles*, however, when the gun was hidden in a place to which the public had access, Raborn's truck, where the police officers believed the gun to be, had already been seized and only the police officers had access to the truck. It is difficult therefore, to find that the public-safety exception applies.

Id. at 595.[2] This reasoning cannot be reconciled with the decision in this case. See also *United States v. Brathwaite*, 458 F.3d 376, 382 n.8 (5th Cir. 2006) (finding that where "agents had performed two sweeps of the house and had both occupants of the house in handcuffs," officers could not ask about the presence of weapons in the house).

B. In Contrast, Three Circuits, Including The Court Below, Allow Officers To Question An Arrested Suspect Without Giving *Miranda* Warnings Whenever Officers May Be Subject To A Future Danger.

For three other courts of appeals, the *Quarles* exception applies even in situations where the public or law enforcement officers do not face an imminent threat. These courts allow police officers to question suspects concerning that danger, regardless of the officers' ability to contain, postpone, or control the danger via other means. In these circuits, therefore, the danger that officers might reasonably fear coming

---

[2] The court ultimately upheld entry of the firearm into evidence based on the inevitable discovery doctrine. See 872 F.2d at 595.

upon hidden weapons or other dangerous materials during a search is sufficient to justify questioning a suspect prior to giving *Miranda* warnings.

1. In the decision below, the Eighth Circuit held that "the risk of police officers being injured by the mishandling of unknown firearms or drug paraphernalia provides a sufficient public safety basis to ask a suspect who has been arrested and secured whether there are weapons or contraband in a car or apartment that the police are about to search." App., *infra*, 5a. Under this test, it is irrelevant whether officers had an urgent need to search the car or apartment. It also does not matter whether officers could, or did, secure the area to prevent public access. See also *Luker*, 395 F.3d at 833-34 (sufficient to justify pre-*Miranda* warning questioning that "officers were aware of Luker's history of methamphetamine use and were concerned about needles or substances associated with such use in the car").

2. The First Circuit also has allowed officers to question suspects who have not received *Miranda* warnings about weapons in a secured vehicle. *United States* v. *Fox*, 393 F.3d 52 (1st Cir. 2004), *vacated on other grounds*, 545 U.S. 1125 (2005). See App., *infra*, 10a (Gruender, J., concurring) ("[T]he First Circuit agrees with our precedents."). As in this case, the defendant in *Fox* had been arrested and placed in the officer's car. Nonetheless, the court held that the potential that a weapon could be hidden in the defendant's car was "ample reason [for the officer] to fear for his own safety and that of the public." 393 F.3d at 60. Moreover, once the officer found a gun, the First Circuit permitted him to question the suspect about its operation, finding that the danger of transporting a potentially loaded weapon

also was sufficient to trigger the *Quarles* exception. *Ibid.*

3. The Tenth Circuit has taken a similar approach. In *United States* v. *Phillips*, 94 Fed. Appx. 796 (10th Cir. 2004), which involved a house search, the Tenth Circuit specifically held that the danger of coming across a weppon was sufficient to trigger *Quarles*. "[T]he fact that the other residents of the house were secured did not completely eliminate the risk that a weapon hidden somewhere could pose a danger to one of them or to the police." *Id.* at 801 n.2.

II. The Decision Below Departs From *Quarles*, Which Recognized A Limited Exception To *Miranda* That Applies When There Is An Imminent Danger And Immediate Need for Questioning.

In addition, review is warranted because the decision below is inconsistent with this Court's approach in *Quarles*. The Court there recognized a "public safety" exception to *Miranda* that would govern a very narrow range of circumstances involving threats to the public or law enforcement officers. In *Quarles*, police officers, "in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun" that the defendant had just discarded in a busy supermarket. 467 U.S. at 657. It was undisputed that the weapon "obviously posed more than one danger to the public safety: an accomplice might make use of it, [or] a customer or employee might later come upon it." *Id.* The Court concluded that in such an emergency situation, it would be "untenable" to require officers to decide "in a matter of seconds" whether to forego the *Miranda* warning at the cost of

admissibility of any incriminating statement, or to issue a warning that would preserve admissibility but undermine the officers' ability to "neutralize the volatile situation confronting them." *Id.* at 657-58. The *Quarles* Court therefore acknowledged the "public safety" exception expressly to avoid such untenable "on-the-scene balancing" dilemmas. *Id.* at 658.

None of the same concerns applies to a situation where, as here, police officers have arrested the suspect and placed him in their patrol car, and no third parties are in the vicinity who might come upon a weapon and threaten the officers or the public safety. In this case, petitioner was sitting quietly, handcuffed, inside a police cruiser. The officers had searched petitioner thoroughly for weapons and satisfied themselves that he was not armed or carrying anything dangerous. In this setting, the officers clearly were not faced with the "untenable" challenge of balancing, in a split-second, petitioner's Fifth Amendment rights against the public safety. They were in control of the scene, the vehicle could have been impounded and searched by the officers at their leisure (as, in fact, it subsequently was), and there simply "was no exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a * * * crime." *Quarles*, 467 U.S. at 659 n.8.

In these circumstances, the Eighth Circuit's expansive reading of the public safety exception threatens to eviscerate *Miranda* with respect to most interrogations preceding a search. It is hard to imagine a scenario in which police officers about to conduct a vehicle search have greater control of the scene than the one that unfolded in this case: petitioner "was handcuffed and under the control of the two officers, and there were no passengers or nearby members of the public who could have accessed or

been harmed by the contents of [petitioner]'s car." App., *infra*, at 4a. Nevertheless, the court of appeals concluded that the officers were "were confronted with the immediate necessity of ascertaining" (*Quarles*, 467 U.S. at 657) whether there was another weapon in the car because they faced a "risk of * * * being injured by * * * mishandling" any evidence they might uncover. App., *infra*, 5a. But, of course, practically *every* search police officers conduct includes a risk of coming across evidence that might be dangerous. Following the rationale of the court below, officers will be free to interrogate suspects about their knowledge of dangerous contraband preceding any search, of any location or facility, without the "[simple] expedient of giving an adequate warning" (*Miranda*, 384 U.S. at 468) that the suspect may remain silent.

In fact, the situation in this case is much more similar to *Orozco* v. *Texas*, 394 U.S. 324 (1969), a case in which the Court ordered evidence suppressed, than it is to *Quarles*. Judge Gruender explained the parallel (App., *infra*, 8a):

> In *Orozco*, four police officers entered Orozco's boardinghouse and awakened him. 394 U.S. at 325. Without giving *Miranda* warnings,, the officers interrogated Orozco about a murder committed four hours earlier. The police asked if he had been present at the scene of the shooting, whether he owned a gun and where the gun was located. The defendant admitted that he was present at the scene, that he owned a pistol and that the pistol was located in the washing machine in a backroom of the boardinghouse. The *Orozco* Court held that all the statements should have been suppressed. *Id.* at 327.

Judge Gruender also observed (see App., *infra*, 8a) that *Quarles* specifically distinguished its circumstances from those in *Orozco*, explaining that "[i]n *Orozco*, * * * the questions about the gun were clearly investigatory; they did not in any way relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon. In short there was no exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime." 467 U.S. at 659 n.8.

As Judge Gruender accordingly concluded (App., *infra*, 8a-9a:

> Because the police reasonably suspected that Orozco committed murder with a gun, there existed a realistic possibility that the weapon was hidden somewhere in the boardinghouse. Had the Supreme Court believed the public safety exception applied to situations where officers could happen upon weapons "unexpectedly or mishandle[ ] them in some way," then the public safety exception would have been applicable in *Orozco*. However, the *Quarles* Court did not indicate that the inherent danger of a trained police officer discovering a weapon by itself was sufficient to justify the application of the exception.

That, however, is just the rule the Eighth Circuit derived from *Quarles* in this case.

By holding that the questioning of a suspect prior to the issuance of *Miranda* warnings is permissible even when there is no imminent danger, the decision below essentially creates a reasonableness or "convenience" exception to *Miranda*. But *Quarles* specifically rejected the idea of such a reasonableness

exception. See *Quarles*, 467 U.S. at 653 n.3 ("[T]he Fifth Amendment's strictures, unlike the Fourth's, are not removed by a showing of reasonableness.") (quoting *Fisher* v. *United States*, 425 U.S. 391, 400 (1976)). Such a rule cannot be applied consistently by police officers and courts. See *Dickerson* v. *United States*, 530 U.S. 428, 444 (2000) ("But experience suggests that the totality-of-the-circumstances test * * * is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner."). Given the great practical importance of holdings like the one below adopting such a rule – searches like the one in this case occur with great frequency[3] and law enforcement officers often will have reason to suspect the presence of guns or other dangerous materials[4] – further review in this case is warranted.

---

[3] For example, the Bureau of Justice Statistics estimates that there were 854,990 car searches in 2005. See BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, CONTACTS BETWEEN POLICE AND THE PUBLIC 2005 at 6, http: //www.ojp.gov/bjs/pub/pdf/cpp05. pdf.

[4] Not only is finding guns or drug paraphernalia a very real possibility in many, if not most, criminal searches, but the high rate of gun ownership in the United States could be enough, under the Eighth Circuit's rule, to justify police officers in *always* asking about the presence of weapons in a house or car before searching it. Compare TOM W. SMITH, PUBLIC ATTITUDES TOWARDS THE REGULATION OF FIREARMS at Fig. 2 (March 2007), http://www-news.uchicago.edu/releases/07/pdf/070410. guns. norc.pdf (finding that 34.5% of households contain a gun) *with* NATIONAL RIFLE ASSOCIATION OF AMERICA, INSTITUTE FOR LEGISLATIVE ACTION, MORE GUNS, LESS CRIME (Sept. 28, 2007) *available at* http://www.nraila.org/ Issues/ Fact-Sheets/Read.aspx?id=206 (noting that numerous studies have found "almost half of all households have at least one gun owner").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN M. KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

AUGUST 2008

APPENDICES

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-1337

United States of America,

Plaintiff - Appellee,

v.

Antonio Ray Liddell,

Defendant - Appellant.

Appeal from the United States
District Court for the
Southern District of Iowa.

Submitted: October 16, 2007

Filed: February 25, 2008

Before LOKEN, Chief Judge, GRUENDER and BENTION, Circuit Judges.

LOKEN, Chief Judge.

Antonio Ray Liddell pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). As permitted by a condition in his plea agreement, Liddell now appeals the denial of his motion to suppress a post arrest statement made without the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). We agree with the district court[1] that the arresting officers' in-custody questioning fell within the public safety exception to *Miranda* established in *New York*

---

[1] The HONORABLE JAMES E. GRITZNER, United States District Judge for the Southern District of Iowa.

v. *Quarles*, 467 U.S. 649 (1984). Accordingly, we affirm.

The following facts are undisputed. At approximately 12:45 a.m., Police Officer Michael Adney stopped a car driven by Liddell for a loud music violation. Adney arrested Liddell when a check revealed that he was barred from driving in Iowa. After the arrest, a pat-down search uncovered a bag of marijuana, $183 in cash, and two cell phones. Adney handcuffed Liddell and placed him in the patrol car. Meanwhile, Police Officer Jon Melvin arrived to assist and began to search Liddell's car incident to the arrest. When Melvin discovered an unloaded .38 caliber revolver under the front seat, he showed the gun to Adney and asked whether Liddell's person had been thoroughly searched after the arrest.

Adney removed Liddell from the patrol car and asked, referring to Liddell's car, "Is there anything else in there we need to know about?" Melvin added, "That's gonna hurt us?" Adney repeated, "That's gonna hurt us? Since we found the pistol already." Liddell laughed and said, "I knew it was there but . . . it's not mine," before telling the officers there were no other weapons in his car. Melvin completed the search of the car, finding .38 caliber ammunition and rolling papers used to make marijuana cigarettes.

Charged with unlawful possession of the firearm and with unrelated drug offenses, Liddell entered a conditional plea of guilty to the felon-in-possession charge after the district court denied a motion to suppress his highly incriminating statement that he knew the .38 revolver was under the front seat of his car. In the district court and on appeal, the government conceded that Liddell was in custody and had

not been given *Miranda* warnings at the time the officers asked the question that elicited this incriminating statement. Thus, the issue is whether the statement is admissible under the public safety exception to *Miranda* as articulated by the Supreme Court in *Quarles* and applied by this court in *United States* v. *Williams*, 181 F.3d 945 (8th Cir. 1999), and *United States* v. *Luker*, 395 F.3d 830 (8th Cir.), *cert. denied*, 546 U.S. 831 (2005). "Whether facts support an exception to the *Miranda* requirement is a question of law" that we re view *de novo*. *United States* v. *Lackey*, 334 F.3d 1224, 1226 (10th Cir.), *cert. denied*, 540 U.S. 997 (2003); *accord United States* v. *Talley*, 275 F.3d 560 , 561 (6th Cir. 2001).

In *Quarles*, the Supreme Court held that "there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence." 467 U.S. at 655. In this context, protection of the public safety includes protection of the police officers themselves. *Id.* at 658 n.7, 659. The exception does not depend upon the subjective motivation of the questioning officers. Instead, the Court adopted an objective standard: the exception applies when "police officers ask questions reasonably prompted by a concern for the public safety." *Id.* at 656, quoted in *Williams*, 181 F.3d at 953. It does not apply to "questions designed solely to elicit testimonial evidence from a suspect." 467 U.S. at 659.[2]

---

[2] Because this is an objective standard, and because police officers must react spontaneously to situations posing a threat to public safety, the public safety exception does not turn on the specific form of questions asked. *See* Williams, 181 F.3d at 953 n.13; *United States* v. *Newton*, 369 F.3d 659, 678-79 & n.8 (2d Cir. 2004). There can be no doubt that the question posed

Liddell argues that the public safety exception does not apply because, at the time the officers asked the question that prompted his incriminating admission, "there was no longer an objective reasonable need to protect the police or the public from any immediate danger" because the revolver had been found, Liddell was handcuffed and under the control of the two officers, and there were no passengers or nearby members of the public who could have accessed or been harmed by the contents of Liddell's car. The district court rejected this contention, explaining:

> The discovery of a firearm hidden in a vehicle would lead an officer to have an objectively reasonable concern that other, possibly loaded, firearms may also be in the vehicle which could cause harm to an officer if they were to happen upon them unexpectedly or mishandle them in some way. The accidental discovery of additional weapons poses a threat to officer safety and at the time the officers conducted their limited questioning of [Liddell], given the information then known to them, it was reasonable for the officers to believe this threat existed. There was no way for Officer Melvin or Officer Adney to know that the firearm found

---

by the officers in this case was sufficiently focused on public safety to trigger the public safety exception. By contrast, the Court explained in *Quarles*, 467 U.S. at 659 n.8, the post-arrest questioning without *Miranda* warnings in *Orozco* v. *Texas*, 394 U.S. 324, 325-26 (1969), was "clearly investigatory."

> under the driver's seat was ultimately the only weapon or dangerous device located inside of the vehicle.

The district court's analysis is consistent with this court's controlling precedents. Our prior cases recognized that the risk of police officers being injured by the mishandling of unknown firearms or drug paraphernalia provides a sufficient public safety basis to ask a suspect who has been arrested and secured whether there are weapons or contraband in a car or apartment that the police are about to search. *See Luker*, 395 F.3d at 832 (public safety exception applied to post-arrest question whether there was anything in intoxicated driver's car the police should know about); *Williams*, 181 F.3d at 953-54 (public safety exception applied to post-arrest question, "is there anything we need to be aware of" in the suspect's apartment, because the police "could not have known whether other hazardous weapons were present . . . that could cause them harm if they happened upon them unexpectedly or mishandled them in some way"). *Accord Lackey*, 334 F.3d at 1227-28; *contra United States* v. *Williams*, 483 F.3d 425, 428 (6th Cir. 2007). Here, when the officers found Liddell's concealed .38 caliber revolver, they had good reason to be concerned that additional weapons might pose a threat to their safety when they searched Liddell's car incident to a late-night arrest.

The judgment of the district court is affirmed.

GRUENDER, Circuit Judge, concurring.

Based on our circuit's precedents, I concur in the opinion of the Court. However, I write separately to explain my concern that our decisions applying the

public safety exception to *Miranda* have strayed from the Supreme Court's tethering of the exception to the existence of exigent circumstances.[3]

As an alternative rationale in *Williams* and then followed in *Luker*, this court held that the public safety exception to *Miranda* applies to situations where a police officer could happen upon weapons or needles "unexpectedly or mishandle[ ] them in some way." *Williams*, 181 F.3d at 954. In so holding, this court applied the exception to the possible handling of an inherently dangerous instrumentality but neglected the Supreme Court's requirement of exigent circumstances associated with recovering the item. Therefore, I concur in the Court's opinion in this case, even though this record is bereft of evidence of exigent circumstances associated with the possible discovery of a weapon in Liddell's vehicle.

In *Quarles*, the Supreme Court recognized the public safety exception to *Miranda* and premised the applicability of this "narrow exception to the *Miranda* rule" on exigent circumstances. 467 U.S. at 658. There, Quarles, accused of armed rape, fled into a supermarket. When Quarles was arrested moments later, the police officers found him wearing an empty holster. Before giving *Miranda* warnings, the officers asked where the gun was located, and Quarles directed them to the gun's location. The Supreme Court upheld the admission into evidence of Quarles' statement because "[s]o long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accom-

---

[3] Exigent means "[r]equiring immediate action or aid; urgent." Black's Law Dictionary 614 (8th ed. 2004).

plice might make use of it, a customer or employee might later come upon it." *Id.* at 657. The Supreme Court stated that "[t]he exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it." *Id.* at 658. Throughout the opinion, the Court focused on the urgency of the situation. *See, e.g., id.* at 657-58 ("We decline to place officers ... in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them."); *id.* at 658 ("[W]e recognize here the importance of a workable rule to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."). The Supreme Court did not express any concern that a trained police officer discovering a weapon in an otherwise secured environment would justify applying the exception. Rather, the Court did express that the exception would apply when the public "might later come upon [the weapon]," thereby creating an immediately dangerous situation. *Id.* at 657.

The Supreme Court further stated that the public safety exception to *Miranda* applies when officers ask "questions reasonably prompted by a concern for the public safety" and not to "questions designed solely to elicit testimonial evidence from a suspect." *Id.* at 656, 659. However, the Court clarified that the exigency of the situation would distinguish between

these types of questions. *Id.* at 659 n.8. To illustrate this point, the Court compared *Quarles* with *Orozco* v. *Texas*, 394 U.S. 324 (1969). *Id.* In *Orozco*, four police officers entered Orozco's boardinghouse and awakened him. 394 U.S. at 325. Without giving *Miranda* warnings,, the officers interrogated Orozco about a murder committed four hours earlier. The police asked if he had been present at the scene of the shooting, whether he owned a gun and where the gun was located. The defendant admitted that he was present at the scene, that he owned a pistol and that the pistol was located in the washing machine in a backroom of the boardinghouse. The *Orozco* Court held that all the statements should have been suppressed. *Id.* at 327. The *Quarles* Court stated:

> In *Orozco*, however, the questions about the gun were clearly investigatory; they did not in any way relate to an objectively reasonable need to protect the police or the public from any *immediate danger* associated with the weapon. In short there was no *exigency requiring immediate action* by the officers beyond the normal need expeditiously to solve a serious crime.

Quarles, 467 U.S. at 659 n.8 (emphasis added). Because the police reasonably suspected that Orozco committed murder with a gun, there existed a realistic possibility that the weapon was hidden somewhere in the boardinghouse. Had the Supreme Court believed the public safety exception applied to situations where officers could happen upon weapons "unexpectedly or mishandle[ ] them in some way," then the public safety exception would have been ap-

plicable in *Orozco*. However, the *Quarles* Court did not indicate that the inherent danger of a trained police officer discovering a weapon by itself was sufficient to justify the application of the exception. As I read *Quarles*, the public safety exception to *Miranda* applies only when (1) an immediate danger to the police officers or the public exists, or (2) when the public may later come upon a weapon and thereby create an immediately dangerous situation. Therefore, the public safety exception to *Miranda* would not apply to situations where officers could happen upon a weapon "unexpectedly or mishandle[ ] them in some way," unless some evidence of exigency is presented.

The record in this case does not establish the existence of exigent circumstances. Here, the police had removed Liddell from his vehicle, handcuffed him, conducted a pat-down search, and placed him into their patrol car. After the officers had secured both Liddell and his car, they began searching his vehicle. Upon finding an unloaded .38 caliber revolver under the front seat, the officers asked if anything else in the car could hurt them. After a discussion with Liddell, the officers completed the search of Liddell's car. Although the search of a vehicle that potentially contains a loaded weapon may well be inherently dangerous, the record does not establish that any immediate danger existed as a result of the possible presence of such a weapon in Liddell's car or that the public might have later come upon a weapon. There was no evidence, for instance, supporting the necessity of an immediate search or continued search of the vehicle by the officers, either because of some immediate safety concern or because the vehicle was to be left unsecured by the roadside where the public might gain access to any weapon left in it. Because Liddell was arrested for driving

while barred, there was no immediate danger that Liddell would be allowed to return to his car where he might have access to a hidden weapon. Furthermore, there was no evidence that the officers could not safely impound and tow Liddell's car in order to conduct a search of it at a later time. Based on the record developed in the district court, the public safety concern was not related to any exigent circumstances but rather limited to the fact that the officers might have unexpectedly encountered or mishandled a weapon hidden in Liddell's vehicle.

Although the First Circuit agrees with our precedents, three other circuits do not. *Compare United States* v. *Fox*, 393 F.3d 52 (1st Cir. 2004) (applying the public safety exception on similar facts as in this case), with *United States* v. *Mobley*, 40 F.3d 688 (4th Cir. 1994), *United States* v. *Raborn*, 872 F.2d 589 (5th Cir. 1989), and *United States* v. *Williams*, 483 F.3d 425 (6th Cir. 2007). In *Mobley*, agents arrested the defendant at his front door and made a security sweep of the apartment, which revealed that Mobley was alone. 40 F.3d at 690. With Mobley outside of the apartment, the agents asked him whether anything in the apartment could be of danger to the agents who would be conducting the search. The Fourth Circuit held that the public safety exception to *Miranda* did not apply because the police had already secured the apartment and determined that no one else was present. *Id.* at 693; *see also United States* v. *Melvin*, 2007 WL 2046735 (4th Cir. 2007) (per curium) (relying on *Mobley*, the court held that the public safety exception did not apply where officers questioned Mobley about whether he had a weapon in his car when the car was secured and already heading to the impound lot). In *Raborn*, upon being stopped by DEA agents, Raborn exited his

truck, removed a pistol from his holster and placed it in side the vehicle. 872 F.2d at 592. The agents handcuffed Raborn and the other passenger and placed them on the ground outside. Unable to locate the gun after a search of the front seat, one of the officers asked Raborn where he had placed it. Raborn replied that the gun was under the seat cover. The Fifth Circuit stated that "[the vehicle] had already been seized and only the police officers had access to the truck. It is difficult therefore, to find that the public-safety exception applies." *Id.* at 595. Finally, the Sixth Circuit has held that the public-safety exception to *Miranda* applies only if "(1) ... the defendant might have (or recently have had) a weapon, and (2) ... someone other than police might gain access to that weapon and inflict harm with it." *Williams*, 483 F.3d at 428.

Based on *Quarles* and the limited record before us, I would conclude that the public safety exception to *Miranda* would not apply because there is no evidence that an immediate danger existed as a result of the possible presence of such a weapon in Liddell's car or that the public might have later come upon such a weapon. Nonetheless, the public safety exception to *Miranda* applies because the fact that the officers might have unexpectedly encountered or mishandled a weapon hidden in Liddell's vehicle alone is sufficient to justify the application of the exception under *Williams* and *Luker*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTONIO RAY LIDDELL,

Defendant.

No.3:05-cr-00568-JEG

ORDER

This matter is before the Court on Defendant Antonio Ray Liddell's December 8, 2005, Motion to Suppress, which the Government resists. Hearing was held on the matter on January 3, 2005.[1] Defendant was represented by Alfred Willett. The Government was represented by Assistant United States Attorney Cliff Cronk. The motion is now fully submitted to the Court for review. For the reasons discussed below, the motion is denied.

SUMMARY OF MATERIAL FACTS

On August 18, 2005, at approximately 12:45 a.m., Clinton Police Officer Michael Adney activated his emergency lights and initiated a traffic stop on a ve-

---

[1] The Clinton police officers involved in the traffic stop and search of Defendant's vehicle were available at the time of the hearing but were not called to testify. The Government and the Defendant stipulated to a record consisting of the video recordings made by cameras in both patrol vehicles (Ex. 1), a transcript of the specific questions and Defendant's answers which are at issue (Ex. 2), and the narrative reports prepared by the two officers (Ex. A and B).

hicle being driven by Antonio Ray Liddell ("Defendant"), after observing the vehicle was playing extremely loud music. A review of Officer Adney's cruiser camera videotape reveals that Defendant did not immediately stop his vehicle but instead drove another two or three blocks, making three turns before finally stopping for the officer. After approaching the vehicle and speaking with Defendant, Officer Adney determined that Defendant was barred from operating a motor vehicle in Iowa, and Defendant was placed under arrest for driving while barred. Officer Adney had Defendant exit his vehicle, placed him in handcuffs, and then conducted a pat-down search of Defendant's person, finding a baggie containing a substance that appeared to be marijuana, $183 cash, and two cellular phones. Defendant was then placed in Officer Adney's patrol unit.

At approximately 12:51 a.m., Officer John Melvin arrived on the scene to assist Officer Adney. Incident to the arrest, both Officer Melvin and Officer Adney began a cursory search of Defendant's vehicle at approximately 12:53 a.m. Officer Adney returned to his police cruiser at approximately 12:55 a.m., opened the back door of the cruiser, and briefly spoke with Defendant.[2] During this time, Officer Melvin continued to search the front seat area of Defendant's vehicle. It was at this time that Officer Melvin first located an unloaded, pearl-handled, .38 caliber Smith & Wesson revolver under the driver's seat.

---

[2] Officer Adney's cruiser camera did not produce any audio; however, the substance of this brief conversation is irrelevant to the issue presented.

Officer Melvin immediately halted his search and asked Officer Adney to return to Defendant's vehicle. Officer Melvin showed the firearm to Officer Adney and informed him that the weapon looked real but was unloaded. The officers briefly discussed charging Defendant with carrying a concealed weapon, and then both officers returned to Officer Adney's patrol vehicle. While walking back to the patrol unit, Officer Melvin asked Officer Adney if he had checked Defendant good, and if he had given Defendant a good crotch search to ensure nothing was hidden in that area. Officer Adney indicated that he had patted Defendant down. Officer Adney then had Defendant exit the patrol unit and asked Defendant, "Is there anything else in there we need to know about?" Before Defendant could respond to this inquiry, Officer Melvin immediately qualified the question by adding, "That's gonna hurt us?" Officer Adney then repeated this statement to Defendant, stating, "That's gonna hurt us? Since we found the pistol already."[3] Defendant responded by stating, " . . . I knew it was there but it . . . it's not mine." Defendant was patted down a second time and was again placed in Officer Adney's patrol vehicle. Nothing

---

[3] Defense counsel stated at hearing that Defendant does not take exception to the way the question was phrased but rather takes issue with the timing of the questioning that took place. The Court notes that "the fact that [a] question was also broad enough to elicit other information does not prevent application of the public safety exception when safety was at issue." *United States* v. *Williams*, 181 F.3d 945, 954 n.13 (8th Cir. 1999). Law enforcement's question, "Is there any thing else in the vehicle we need to know about", which was immediately qualified by adding, before Defendant responded, "that's gonna hurt us?", is not so overly broad as to preclude the application of the public safety exception.

was found on Defendant's person during this second pat-down search. Defendant and the Government agree that no *Miranda*[4] warnings were given to Defendant prior to his being asked whether anything else was located in the vehicle, and the Government concedes Defendant was under arrest and in custody at the time of the limited questioning.

Officer Adney subsequently transported Defendant to the police department, while Officer Melvin resumed his search of Defendant's vehicle. During this more thorough search of the vehicle, Officer Melvin searched the entire passenger compartment, the glove box, and the trunk. Officer Melvin's search of the vehicle produced the previously referenced firearm, some rolling papers which are commonly used to roll marijuana cigarettes, and a sock that contained ammunition.

On September 14, 2005, Defendant was charged in a four-count indictment with distribution of drugs (counts one, two, and three) and being a felon in possession of a firearm (count four). On December 8, 2005, Defendant filed a motion to suppress. Defendant contends that while he was in custody, he was questioned by law enforcement prior to being advised of his *Miranda* rights; therefore, any statements made by him should be suppressed as obtained in violation of his Fifth Amendment rights.

The Government resists the motion to suppress. The Government argues the questioning by law enforcement while Defendant was in custody and prior to any *Miranda* warnings falls under the "public safety exception" to *Miranda*.

---

[4] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

APPLICABLE LAW AND DISCUSSION

"Unless a person in custody has been advised that he has the right to remain silent, that any statement he makes can be used as evidence against him, and that he has a right to an attorney, statements made in response to interrogation must generally be suppressed." *United States* v. *Mendoza-Gonzalez*, 363 F.3d 788, 795 (8th Cir. 2004). "The *Miranda* protections are triggered only when a defendant is both in custody and being interrogated." *United States* v. *Hatten*, 68 F.3d 257, 261 (8th Cir. 1995) (citing *United States* v. *Lawrence*, 952 F.2d 1034, 1036 (8th Cir.), *cert. denied*, 503 U.S. 1011 (1992)). There is no dispute that Defendant was in custody at the time he was questioned by law enforcement.

The Government argues that given the circumstances of the present case, law enforcement's limited questioning of Defendant falls within the public safety exception to *Miranda*. The Supreme Court first announced the public safety exception to *Miranda* in *New York* v. *Quarles*, in which it articulated the relevant inquiry as whether law enforcement's questioning related to "an objectively reasonable need to protect the police or the public from any immediate danger." *New York* v. *Quarles*, 467 U.S. 649, 659 n.8 (1984). "Under [the public safety] exception, a suspect's answers to questions from a police officer are admissible in the absence of a *Miranda* warning so long as the questions asked of the suspect are reasonably prompted by a concern for the public safety." *United States* v. *Williams*, 181 F.3d 945, 953 (8th Cir. 1999) (quoting *Lawrence*, 952 F.2d at 1036) (quotations omitted). The public safety exception applies where, as in the present case, con-

cerns for public safety are not present but concerns for officer safety are. *Id.* at 954 n.13.

When the public safety exception has been applied, law enforcement is generally in possession of some piece of information which takes the facts outside of the routine and ordinary arrest scenario and raises public or officer safety concerns. *See Quarles*, 467 U.S. at 652 (officers confronted with the immediate necessity of locating a firearm where the defendant was apprehended wearing an empty holster); *United States* v. *Donachy*, 2004 WL 2823347, *2-3 (10th Cir. 2004) (law enforcement's questioning of defendant regarding the whereabouts of a gun was justified where the officers knew defendant was in possession of two firearms but could only locate one during their initial search); *Lawrence*, 952 F.2d at 1037 (officers were aware that defendant had disposed of a gun while fleeing, thus officers had a reasonable concern that the gun might be found by an innocent individual and do harm); *United States* v. *Knox*, 950 F.2d 516, 519 (8th Cir. 1991) (where defendant was carrying a loaded magazine but no firearm when he was arrested, officers were justified in making an immediate attempt to locate the gun to protect public and officer safety); *compare United States* v. *Mobley*, 40 F.3d 688, 693 (4th Cir. 1994) (where law enforcement was in possession of no information raising a safety concern or otherwise separating the facts of the arrest from those of an ordinary and routine arrest situation, there was no demonstration of an immediate safety concern, and the public safety exception was not applicable).

In *United States* v. *Luker*, Luker's vehicle was stopped for having an excessively loud muffler, and Luker was subsequently arrested for driving drunk.

United States v. *Luker*, 395 F.3d 830, 831-832 (8th Cir. 2005). The arresting officer, who was aware of Luker's history of methamphetamine use and thus concerned about getting stuck by a needle, asked Luker if there was anything on his person that could stick or poke the officer, and then conducted a pat-down search of Luker's person. *Id.* at 832. Law enforcement then asked Luker if there was anything in his vehicle that they should be aware of. *Id.* Luker responded, "Just my .410 [shotgun]." *Id.* All of this occurred prior to Luker being read his *Miranda* rights. *Id.* Law enforcement then searched Luker's vehicle and found the shotgun in Luker's trunk. *Id.* The Eighth Circuit agreed with the district court that the circumstances of the case placed law enforcement's questioning within the public safety exception to *Miranda*, noting that because the officer was aware of Luker's history of methamphetamine use and was therefore concerned about needles or other drug paraphernalia possibly being located in the vehicle, the officer's question regarding what was in the vehicle was justified. *Id.* at 833-834.

In *Williams*, the arresting officers possessed information indicating that Williams had been arrested on a weapons possession charge in the past and that he was currently dealing drugs out of his residence. *Williams*, 181 F.3d at 954 n.14. The Eighth Circuit found Williams' response to the officer's question, "is there any thing we need to be aware of?", asked while Williams was in custody but prior to *Miranda* rights being given, was admissible under the public safety exception to *Miranda*. *Id.* at 953.

> Although Williams' hands were cuffed behind his back when the offi-

> cers asked him if they needed to be aware of anything else, the officers could not have known if any armed individuals were present in the apartment or preparing to enter the apartment within a short period of time. Similarly, the officers could not have known whether other hazardous weapons were present in the apartment that could cause them harm if they happened upon them unexpectedly or mishandled them in some way. Therefore, the district court did not commit error by admitting Williams' statement identifying the location of the gun.

Id. at 953-95. The court specifically noted that, prior to questioning the defendant, the officers had information suggesting that Williams may have possessed a gun or other explosive device. *Id.* at 954 n.14.

At the time Officer Melvin and Officer Adney conducted the cursory search of Defendant's vehicle, which was prior to the discovery of the firearm, the officers possessed no information that would have lead them to believe the contents of the vehicle presented any unusual safety concern. It was not until Officer Melvin located the firearm that the officers became aware that Defendant was traveling with a weapon hidden in his vehicle. The discovery of a firearm hidden in a vehicle would lead an officer to have an objectively reasonable concern that other, possibly loaded, firearms may also be in the vehicle which could cause harm to an officer if they were to happen upon them unexpectedly or mishandle them in some way. The accidental discovery of additional weapons

poses a threat to officer safety and at the time the officers conducted their limited questioning of Defendant, given the information then known to them, it was reasonable for the officers to believe this threat existed. There was no way for Officer Melvin or Officer Adney to know that the firearm found under the driver's seat was ultimately the only weapon or dangerous device located inside of the vehicle.[5]

The cursory search of Defendant's vehicle that occurred prior to the limited questioning of Defendant does not impair the conclusion that a legitimate concern for officer safety existed. The initial search was conducted in the absence of any additional information which would have lead the officers to believe this was anything other than an ordinary and routine arrest scenario. The discovery of the firearm, in a somewhat concealed location under the front seat, constituted an additional piece of information which gave the officers a newfound concern for their safety

---

[5] Defendant argues that once officers found "the" firearm and had cuffed and confined the Defendant, any danger to the officers or others was over, rendering the public safety exception inapplicable to these facts. Defendant argues additional significance from the fact that no other firearm or other dangerous device is found in the more detailed search of the vehicle subsequent to the officers' question about dangerous items. The Court has not been persuaded by this argument because the officers could not know at the time of their question that no other dangerous devices would be found beyond the handgun, nor that only one gun could be present. Consistent with the language in *Williams*, 181 F.3d at 953-54, the officers, once alerted to the initial discovery of the gun, "could not have known whether other hazardous weapons [or other devices] were present in the [vehicle] that could cause them harm if they happened upon them unexpectedly or mishandled them in some way.

and justified the immediate and limited questioning of Defendant that occurred in the absence of *Miranda* warnings.

CONCLUSION

The Court concludes that the officers' very limited questioning of Defendant, conducted while Defendant was in custody but in the absence of *Miranda* warnings, was reasonably prompted by a concern for officer safety and therefore falls within the public safety exception to *Miranda*. Defendant's Motion to Suppress (Clerk's No. 20) must be **denied**.

IT IS SO ORDERED.

Dated this 9th day of January, 2006.

/s/ James E. Gritzner
JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 07-1337

United States,

Appellee

v.

Antonio Ray Liddell,

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Davenport (3:05-cr-00568-RP-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Gruender would grant the petition for rehearing en banc.

Judge Colloton did not participate in the consideration or decision of this matter.

April 23, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

Supreme Court, U.S.
FILED
OCT 22 2008
OFFICE OF THE CLERK

No. 08-227

In the Supreme Court of the United States

ANTONIO RAY LIDDELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, after police officers discover a gun in a car of an individual whom they have arrested and ask the individual, without issuing the warnings required under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), if the car contains anything that could cause harm to the officers, the resulting statements are admissible under the "public safety exception" to *Miranda*.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 4
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Arizona v. *Gant*, No. 07-542 (argued Oct. 7, 2008) 3
Miranda v. *Arizona*, 384 U.S. 436 (1966) 3
New York v. *Quarles*, 467 U.S. 649 (1984) ..... *passim*
Preston v. *United States*, 376 U.S. 364 (1964) 7
Orozco v. *Texas*, 394 U.S. 324 (1969) 10
United States v. *Burns*, 684 F.2d 1066 (2d Cir. 1982) 14
United States v. *Carrillo*, 16 F.3d 1046 (9th Cir. 1994) ... 7
United States v. *Estrada*, 430 F.3d 606 (2d Cir. 2005), cert. denied, 547 U.S. 1048 (2006) 10
United States v. *Fox*, 393 F.3d 52 (1st Cir. 2004), vacated on other grounds, 545 U.S. 1125 (2005) 9
United States v. *Lackey*, 334 F.3d 1224 (10th Cir.), cert. denied, 540 U.S. 997 (2003) 7
United States v. *Leake*, 95 F.3d 409 (6th Cir. 1996) 14
United States v. *Melvin*, No. 05-4997, 2007 WL 2046735 (4th Cir. July 13, 2007), cert. denied, 128 S. Ct. 637 (2007) 11, 12
United States v. *Mobley*, 40 F.3d 688 (4th Cir. 1994), cert. denied, 514 U.S. 1129 (1995) 11
United States v. *Raborn*, 872 F.2d 589 (5th Cir. 1989) ... 13

Cases–Continued: Page

United States v. *Reyes*, 353 F.3d 148 (2d Cir. 2003) ... 8, 10
United States v. *Robinson*, 414 U.S. 218 (1974) 7
United States v. *Webster*, 162 F.3d 308 (5th Cir. 1998), cert. denied, 528 U.S. 829 (1999) 8
United States v. *Williams*, 483 F.3d 425 (6th Cir. 2007) 12

Constitution and statutes:

U.S. Const. Amend. IV 3
18 U.S.C. 922(g)(1) 2, 3
18 U.S.C. 924(a)(2) 2, 3
21 U.S.C. 841(a)(1) 2, 3

In the Supreme Court of the United States

No. 08-227

ANTONIO RAY LIDDELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 517 F.3d 1007. The opinion of the district court (Pet. App. 12a-21a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2008. A petition for rehearing was denied on April 23, 2008 (Pet. App. 22a). On July 14, 2008, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including August 21, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Southern District of Iowa to three

counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). He also entered a conditional plea of guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). He was sentenced to 188 months of imprisonment, to be followed by 72 months of supervised release. The court of appeals affirmed. Pet. App. 1a-11a.

1. At approximately 12:45 a.m. on August 18, 2005, Clinton, Iowa Police Officer Michael Adney noticed that the car driven by petitioner was playing extremely loud music, and he activated his emergency lights to initiate a traffic stop. Petitioner drove two to three blocks and made three turns before finally stopping. After speaking with petitioner and determining that he was barred from driving in Iowa, Adney placed him under arrest and patted him down, finding a bag of marijuana, $183 in cash, and two cell phones. Adney handcuffed petitioner and placed him in the patrol car. Pet. App. 2a, 12a-13a.

Meanwhile, Officer Jon Melvin arrived and began conducting a search incident to arrest of the passenger compartment of petitioner's car. Melvin found an unloaded .38 caliber revolver under the driver's seat, showed the gun to Adney, and asked whether he had searched petitioner thoroughly. Adney removed petitioner from the patrol car and asked, "Is there anything else in there we need to know about?" Melvin immediately added, "That's gonna hurt us?," and Adney repeated, "That's gonna hurt us? Since we found the pistol already." Petitioner said, "I knew it was there * * * but it's not mine," before telling the officers there were no other weapons in the car. Melvin finished searching the car, finding rolling papers and a sock containing .38 caliber ammunition. Pet. App. 2a, 13a-15a.

2. Petitioner was charged with possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), and with three unrelated counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). He moved to suppress his statement about the gun to the arresting officers on the ground that he had not been given *Miranda* warnings before the officers questioned him.* See *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The government argued that the statement was admissible under the "public safety exception" established in *New York* v. *Quarles*, 467 U.S. 649 (1984). Pet. App. 2a-3a, 15a.

The district court denied petitioner's suppression motion, agreeing that "the officers' very limited questioning of [petitioner] * * * was reasonably prompted by a concern for officer safety and therefore falls within the public safety exception to *Miranda*." Pet. App. 21a. The court emphasized that the discovery of a firearm concealed in petitioner's car created "an objectively reasonable concern that other, possibly loaded, firearms may also be in the vehicle which could cause harm to an officer if they were to happen upon them unexpectedly or mishandle them in some way." *Id.* at 19a. Petitioner pleaded guilty to the three drug counts and entered a conditional guilty plea to the felon-in-possession offense, reserving his right to appeal the suppression ruling. He was sentenced to 188 months of imprisonment, to be followed by 72 months of supervised release. 1/29/07 Tr. 11-12.

---

* Petitioner disclaimed any challenge to the search incident to arrest of his car. See 1/3/06 Tr. 27 (petitioner's counsel: "they had every right to search the car"). Thus, this case does not present the Fourth Amendment question that is before this Court in *Arizona* v. *Gant*, No. 07-542 (argued Oct. 7, 2008).

3. The court of appeals affirmed. Pet. App. 1a-11a. It found the district court's analysis to be consistent with circuit precedent and agreed that, "when the officers found [petitioner's] concealed .38 caliber revolver, they had good reason to be concerned that additional weapons might pose a threat to their safety when they searched [petitioner's] car incident to a late-night arrest." *Id.* at 5a.

Judge Gruender concurred. Pet. App. 5a-11a. He agreed that "the search of a vehicle that potentially contains a loaded weapon may well be inherently dangerous," *id.* at 9a, but he explained that, if it were not for prior circuit precedent, he would hold that the public safety exception does not apply in the absence of "exigent circumstances" in the form of "evidence that an immediate danger existed as a result of the possible presence of * * * a weapon in [the] car or that the public might have later come upon a weapon." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-18) that the decision below represents an unwarranted expansion of the "public safety exception" to *Miranda* established by this Court in *New York* v. *Quarles*, 467 U.S. 649 (1984), and that it conflicts with decisions of the Fourth, Fifth, and Sixth Circuits. The decision below is correct and does not expand the public safety exception. Moreover, this is not an appropriate vehicle to resolve whatever tension exists in the circuits on the issue because it would not change the outcome of this case.

1. In *Quarles*, this Court held that *Miranda* does not require the exclusion of unwarned statements elicited by police questioning that is "reasonably prompted by a concern for the public safety." 467 U.S. at 656. In

Quarles, officers chased a rape suspect through a supermarket and arrested him there. *Id.* at 651-652. The officers had been told that the suspect was armed, and, upon frisking him, discovered an empty shoulder holster. *Id.* at 652. After handcuffing the suspect, one of the officers asked him where the gun was. *Ibid.* The suspect responded, "the gun is over there." *Ibid.* The Court held that, although the suspect had not received *Miranda* warnings, his statement was nevertheless admissible. *Id.* at 659. The Court reasoned that, where officers "ask questions reasonably prompted by a concern for the public safety," any statements made in response are admissible, regardless of "the motivation of the individual officers involved." *Id.* at 656. The Court cautioned that such a "public safety" exception "will be circumscribed by the exigency which justifies it." *Id.* at 658. The Court added, however, that "[w]e think police officers can and will distinguish almost instinctively between questions necessary to secure *their own safety or the safety of the public* and questions designed solely to elicit testimonial evidence from a suspect." *Id.* at 658-659 (emphasis added); see also *id.* at 659 n.8 (distinguishing between questions that are "clearly investigatory" and those that "relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon").

The court below correctly applied *Quarles* in holding that petitioner's statement was admissible under the public safety exception. As the court explained, the discovery of a concealed .38 caliber handgun gave the officers "good reason to be concerned that additional weapons might pose a threat to their safety when they searched [petitioner's] car incident to a late-night arrest." Pet. App. 5a. Given their well-founded concern

that "other, possibly loaded firearms m[ight] also be in the vehicle" (*id.* at 19a), the officers had an "objectively reasonable need to protect [themselves]" (*Quarles*, 467 U.S. at 659 n.8) by inquiring about any other dangerous objects before proceeding with their late-night search.

The officers' single question—advising petitioner that they had found the pistol and asking whether there was "anything else" in his car "that's gonna hurt us"—narrowly focused on the need to protect their safety, rather than on any effort to "elicit testimonial evidence." *Quarles*, 467 U.S. at 659. And although the application of the public safety exception does not depend on the subjective motivation of the officers involved, *id.* at 656, everything about the situation here, in which the officers made the inquiry only after finding a previously unnoticed gun hidden in petitioner's car and discussing whether his person had been thoroughly searched, suggests that they were genuinely—and reasonably—concerned about threats to their safety. *Id.* at 659 (recognizing that the public safety exception is intended to "free [officers] to follow their legitimate instincts when confronting situations presenting a danger to the public safety").

Petitioner contends (Pet. 12, 13) that the public safety exception was inapplicable here, because there was not an "emergency" or unusually "urgent need to search." As he explains (Pet. 14), he had been "arrested" and there were "no third parties * * * in the vicinity who might come upon a weapon." But the facts of *Quarles* itself did not involve an emergency of the kind petitioner suggests is required. Like petitioner, the defendant in *Quarles* was handcuffed and in the custody of armed officers. See 467 U.S. at 655. Moreover, as the dissent noted, the police had no evidence that he

had an accomplice, the supermarket was "apparently deserted" during the late-night arrest, and the "police could easily have cordoned off the store and searched for the missing gun." *Id.* at 674-676 (Marshall, J., dissenting); see *United States* v. *Carrillo*, 16 F.3d 1046, 1049 (9th Cir. 1994) (a "pressing need for haste is not essential").

In any event, the late-night search incident to arrest in this case necessarily involved some urgency. Petitioner concedes that—unlike an inventory search associated with impounding a vehicle—the search incident to his arrest could not be "leisure[ly]." Pet. 14. Indeed, a search incident to a custodial arrest is, by definition, "contemporaneous" with the arrest, *Preston* v. *United States*, 376 U.S. 364, 367 (1964), and it "is necessarily" governed by the officer's "quick *ad hoc* judgment." *United States* v. *Robinson*, 414 U.S. 218, 235 (1974). By requiring officers in such circumstances to deliberate about whether to give *Miranda* warnings before asking the arrestee a non-investigative question that could enable them to conduct their search more quickly and safely, petitioner would revoke the permission *Quarles* gave officers to "follow their legitimate instincts." 467 U.S. at 659.

Thus, courts have correctly applied the public safety exception to an officer's inquiry, made before searching a suspect who has been arrested, about whether the arrestee has anything dangerous on his person. See *United States* v. *Lackey*, 334 F.3d 1224, 1227-1228 (10th Cir.) (officer asked handcuffed defendant whether "you have any guns or sharp objects on you"), cert. denied, 540 U.S. 997 (2003); *Carrillo*, 16 F.3d at 1049-1050 (before searching defendant at detention facility, officer asked if he had any drugs or needles on his person);

United States v. *Webster*, 162 F.3d 308, 332 (5th Cir. 1998) (police asked handcuffed suspect whether he had any needles in his pockets that could injure them), cert. denied, 528 U.S. 829 (1999). As the Tenth Circuit explained in *Lackey*, there is little reason to require *Miranda* warnings before police may ask a question that is not designed "to acquire incriminating evidence" (which will presumably be recovered during the search in any case), but is instead designed to protect officers from mishandling firearms or drug paraphernalia they might come upon unexpectedly during a search; in that context, "[t]he risk of incrimination is limited to non-responsive answers." 334 F.3d at 1228; see also *United States* v. *Reyes*, 353 F.3d 148, 154 (2d Cir. 2003) (where arresting officers' "limited" questions "were not posed to elicit incriminating evidence," police could not "be faulted for the unforeseeable results of their words or actions"). That reasoning is equally applicable in this case, where it was only petitioner's non-responsive statement that he "knew [the gun] was there" that was incriminating.

Petitioner's concern (Pet. 7) that the decision below "dramatically undermines *Miranda* because virtually *every* search conducted by police officers involves the possibility of discovering a dangerous item" is mistaken. In this case, the district court found, it was only after Officer Melvin discovered a concealed firearm during his initial "cursory search" of the car that the officers had a "concern for their safety" that "justified the immediate and limited questioning," Pet. App. 20a-21a, and the court of appeals agreed that the discovery of the concealed handgun gave the officers "good reason to be concerned that additional weapons might pose a threat to their safety." *Id.* at 5a.

Petitioner's assertion (Pet. 14) that the officers should simply have impounded his car and searched it "at their leisure" ignores the risks that an unsecured, loaded firearm could pose to police officers or members of the public during the impoundment and subsequent search. See *United States* v. *Fox*, 393 F.3d 52, 60 (1st Cir. 2004), vacated on other grounds, 545 U.S. 1125 (2005). In *Fox*, another traffic-stop case, a police officer discovered an unused shotgun shell during a search incident to the arrest of a suspect whom he had previously arrested for possessing a firearm. Explaining that the officer "had ample reason to fear for his own safety and that of the public," the court concluded that the officer was justified in asking whether the suspect had a gun or other weapon in his vehicle. *Ibid.* Further, the court held, the officer was justified in asking how to open the breech of a shotgun that he found in the suspect's car, in order to avoid the risks of "transporting the gun without first ensuring that it was not loaded." *Ibid.* (noting danger that "dilapidated" gun "could have fired if inadvertently bumped or jostled"). Likewise, in this case, there was no reason to require police officers to bear the risks of impounding and searching—late at night and in the dark—a vehicle that might contain a loaded firearm or other weapons, when the dangers posed by a concealed weapon could be easily dispelled by the officers' narrowly focused inquiry about other dangerous items.

Consistent with *Quarles*, courts have generally not adopted categorical rules governing the application of the public safety exception; instead, the applicability of the exception depends on the circumstances of a particular case. See *Quarles*, 467 U.S. at 658-659 & n.8 (recognizing that the public safety exception reduced the clarity of the *Miranda* rule and distinguishing the facts of

prior cases). Thus, courts have recognized "the need for 'flexibility in situations where the safety of the public and the officers are at risk,'" *United States* v. *Estrada*, 430 F.3d 606, 612 (2d Cir. 2005) (quoting *Reyes*, 353 F.3d at 155), cert. denied, 547 U.S. 1048 (2006), and have also recognized that application of the public safety exception turns on whether, in the particular circumstances presented, officers had an objectively reasonable need to ask safety-related questions in order to neutralize a threat to themselves or to the public. See *Estrada*, 430 F.3d at 612 (exception is "a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of the circumstances in a given case") (internal quotation marks omitted).

Petitioner's reliance (Pet. 15-16) on *Orozco* v. *Texas*, 394 U.S. 324 (1969), is misplaced. There, police officers investigating a shooting murder went to the defendant's boardinghouse, where they woke up the defendant. *Id.* at 325. When the defendant gave his name, the officers put him under arrest and began questioning him about the murder. *Ibid.* They asked whether he had been to the restaurant where the murder occurred, and "when he answered 'yes' he was asked whether he owned a pistol." *Ibid.* When he admitted owning one, they asked where the pistol was located, and the defendant told them. *Ibid.* This Court suppressed the defendant's statements because the defendant had not been given *Miranda* warnings prior to the interrogation. *Id.* at 326-327. As the Court noted in *Quarles*, the line of questions in *Orozco* was "clearly investigatory" and indistinguishable from the questions police would ask "to solve a serious crime." 467 U.S. at 659 n.8. Here, by contrast, the officers' single question—about whether the car contained any items other than the pistol that could "hurt"

the officers during their search—was directed to safety, not crime solving.

2. Petitioner contends (Pet. 7-13) that review by this Court is needed because the court of appeals' conclusion that the public safety exception can be applied on the basis of an officer's "fear of mishandling firearms, drug paraphernalia, or other dangerous items during a search under circumstances similar to those in this case" conflicts with decisions of the Fourth, Fifth, and Sixth Circuits. The cases petitioner cites involve circumstances that differ significantly from those in this case.

In *United States* v. *Mobley*, 40 F.3d 688 (4th Cir. 1994), cert. denied, 514 U.S. 1129 (1995), the court declined to apply the exception to a question that was not intended to protect officers conducting a search incident to an arrest. The agents arrested a suspect who was alone at his apartment and "answered the door naked," making it "quite apparent that he was unarmed." *Id.* at 690. After they had made a protective sweep of the apartment, and "as [the arrestee] was being led away," an FBI agent asked whether there were any weapons in the apartment that could pose a danger to agents who would remain behind to search the apartment pursuant to a warrant. *Id.* at 690-691, 693.

Similarly, the police were not conducting a search incident to an arrest in *United States* v. *Melvin*, No. 05-4997, 2007 WL 2046735 (4th Cir. July 13, 2007), cert. denied, 128 S. Ct. 637 (2007). After they had towed the defendant's truck to an impound lot, he emerged from his house, and officers arrested him on an open warrant. *Id.* at *8. They took him back inside the house and then asked him whether there was "anything the agents needed to know about in the truck." *Ibid.* The court held that the public safety exception did not apply to the

defendant's response, since the truck "was already on its way to the impound lot" and there was no evidence that anything in the truck would pose a threat to the public while at the impound lot. *Id.* at *11. Unlike the instant case, where the police were, at the time they asked the question, actively engaged in an immediate search incident to an arrest and they had already found a weapon (which gave them a legitimate reason for concern that the car might contain additional weapons), no circumstances in *Melvin* raised any specific concern on the part of the police about the presence of weapons in the truck.

In *United States* v. *Williams*, 483 F.3d 425 (6th Cir. 2007), the court considered the government's appeal from an order suppressing an unwarned statement made by a suspect who was arrested in his room at a boarding house. The court stated that the public safety exception would apply only if officers reasonably believed that the suspect had a weapon and that someone other than the police could gain access to it, *id.* at 428-429, but rather than resolving whether the exception applied, the court remanded for additional fact findings by the district court, *id.* at 430. Although it is true that the government did not produce any evidence in this case of a specific risk that a member of the public might obtain access to a weapon within petitioner's car, this Court has made it clear that the public safety exception exists not just to protect third-party members of the public, but also the officers themselves. See *Quarles*, 467 U.S. at 658 n.7 (referring to questions "crucial to [officers'] efforts to protect themselves and the public"); *id.* at 659 (referring to officers' ability to ask "questions necessary to secure their own safety or the safety of the public")'; *id.* at 659 n.8 (noting that the exception applies when there is "an objectively reasonable need to protect the

police or the public from any immediate danger associated with the weapon").

Finally, petitioner claims (Pet. 10-11) a conflict with *United States* v. *Raborn*, 872 F.2d 589 (5th Cir. 1989). In *Raborn*, however, the defendant challenged the admission of the gun that was discovered under the seat cover in his truck, rather than his statement that it was located there. Thus, the Fifth Circuit merely observed in passing that it would be "difficult" to apply the public safety exception to circumstances where "only the police officers had access to the [suspect's] truck," before affirming the admission of the weapon on an inevitable discovery theory. *Id.* at 595. Even assuming that inconclusive dictum about the public safety exception reflects a general approach of the Fifth Circuit, it could not be read so broadly as to require exclusion under the facts of a case such as this, where officers, having come upon one weapon, specifically inquired about other objects that might "hurt" them, demonstrating an objectively reasonable focus on safety as opposed to investigation.

3. Even if the decision below is in tension with some of the reasoning of some of the decisions petitioner cites, this case is not an appropriate vehicle for resolving the issue because the court of appeals' application of the public safety exception did not alter the ultimate outcome of this case. When the police stopped petitioner's car, he was the sole occupant, and they discovered a handgun underneath the driver's seat. Petitioner's statement (that he knew the gun was there but that it was not his) was not necessary to prove his status as a convicted felon or his illegal possession of that firearm. As a result, even if the district court erred in refusing to suppress that statement, petitioner would be unable to establish any entitlement to withdraw his guilty plea.

See, *e.g.*, *United States* v. *Leake*, 95 F.3d 409, 420 n.21 (6th Cir. 1996) (explaining that a defendant is not entitled to withdraw a conditional plea simply because he "manages to exclude any evidence on appeal"; instead, "[t]he inquiry requires an examination of the degree of success and the probability that the excluded evidence would have had a material effect on the defendant's decision to plead guilty"); *United States* v. *Burns*, 684 F.2d 1066, 1076 (2d Cir. 1982) (declining to permit defendant to withdraw conditional plea where the otherwise admissible evidence was so overwhelming that suppression of the challenged evidence "would not have altered [the defendant's] decision to plead guilty"), cert. denied, 459 U.S. 1174 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
DEBORAH WATSON
Attorney

OCTOBER 2008

Supreme Court, U.S.
FILED
NOV 5 - 2008
OFFICE OF THE CLERK

No. 08-227

In the Supreme Court of the United States

ANTONIO RAY LIDDELL,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

DAN M. KAHAN
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. The Circuits Are In Conflict On The Question Presented 1

B. The Decision Below Departs From *Quarles* 4

C. This Case Presents An Appropriate Vehicle With Which To Address The Question Presented 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

CASES

New York v. *Quarles*,
467 U.S. 649 (1984) ..... *passim*

United States v. *Dutchie*,
2008 WL 4168423 (D. Utah Sept. 2, 2008) 1

United States v. *Jackson*,
No. 07-2510, 2008 WL 4499991 (1st Cir. Oct. 8, 2008) 1

United States v. *Leake*,
95 F.3d 409 (6th Cir. 1996) 8

United States v. *Melvin*,
2007 WL 2046735 (4th Cir. 2007) 2, 3

United States v. *Mobley*,
40 F.3d 688 (4th Cir. 1994) 2, 3

United States v. *Raborn*,
872 F.2d 589 (5th Cir. 1989) 2, 3, 4

United States v. *Williams*,
483 F.3d 425 (6th Cir. 2007) 2

REPLY BRIEF FOR PETITIONER

As Judge Gruender explained below, the courts of appeals are sharply divided on the scope and application of the "public safety" exception to *Miranda* that this Court recognized in *New York* v. *Quarles*, 467 U.S. 649 (1984). See Pet. App. 10a. This issue is a recurring one of substantial practical importance; indeed, since the filing of the petition for a writ of certiorari, two additional courts have addressed the question and rejected the reasoning used by the Eighth Circuit in this case. See *United States* v. *Jackson*, No. 07-2510, 2008 WL 4499991, at *6 n.9 (1st Cir. Oct. 8, 2008) (declining to apply public safety exception when gun "was clearly outside of the reach of Jackson, who was not even in the apartment and, in any event, was surrounded by a number of police officers"); *United States* v. *Dutchie*, 2008 WL 4168423, at *10 (D. Utah Sept. 2, 2008) (declining to apply the exception where "[t]he only identifiable suspects were already in custody, so they posed no threat" and "[t]he scene had been secured, inside and out"). The government's argument, meanwhile, itself confirms that the decision below departs substantially from the holding of *Quarles*. Further review therefore plainly is in order.

A. The Circuits Are In Conflict On The Question Presented

The government appears to recognize "tension" between the holding below and the decisions of other courts of appeals. Br. in Opp. 13. In fact, the conflict is clear and undeniable. The decisions of the Fourth, Fifth, and Sixth Circuits cited in the petition involved circumstances materially identical to those in this case. See Pet. 8-11. In those cases, as in this

one, the suspects had been arrested and taken into custody. In those cases, as in this one, the scene to be searched (premises or an automobile) had been secured by police officers. And in those cases, as in this one, neither the suspect nor anyone else had access to the area. Those other courts found that consideration dispositive, holding that the public safety exception comes into play only if the officer conducting the questioning has reason to believe "that someone other than police might gain access to [a hidden] weapon and inflict harm with it." *United States* v. *Williams*, 483 F.3d 425, 428 (6th Cir. 2007). See *United States* v. *Mobley*, 40 F.3d 688, 693 (4th Cir. 1994); *United States* v. *Melvin*, 2007 WL 2046735, at *11 (4th Cir. 2007); *United States* v. *Raborn*, 872 F.2d 589, 595 (5th Cir. 1989). The court below disagreed, holding the *Quarles* exception triggered whenever police officers fear they might come across something dangerous in the course of a search. See Pet. App. 5a.

The government nevertheless suggests that "[t]he cases petitioner cites involve circumstances that differ significantly from those in this case" (Br. in Opp. 11), although it carefully avoids suggesting that these purported differences actually had any bearing on the analysis used by the courts in those cases. The reason for the government's silence on this point is apparent: The distinctions offered by the government are illusory.

On examination, the government fails even to attempt to distinguish the Sixth Circuit's decision in *Williams*, acknowledging that court's rule that "the public safety exception would apply only if officers reasonably believed that the suspect had a weapon and that someone other than the police could gain

access to it." Br. in Opp. 12.[1] The government gets little farther with the Fourth Circuit's decisions in *Mobley* and *Melvin*. It appears to suggest that those decisions are distinguishable from the holding below because the questioning in those cases was "not intended to protect officers conducting a search incident to an arrest" (*id.* at 11), but that contention is baffling; in those cases, as in this one, arresting officers questioned a suspect who had just been taken into custody because they were concerned that dangerous items might turn up in a search of the suspect's apartment or vehicle. See *Mobley*, 40 F.3d at 693; *Melvin*, 2007 WL 2046735, at *8-*9, *11.[2] And the government cannot distinguish the Fifth Circuit's decision in *Raborn* on the ground that the defendant there "challenged the admission of the gun that was discovered under the seat cover in his truck, rather than his statement that it was located there." *Id.* at 13. The defendant's contention in *Raborn* actually was "that the court erred in admitting the pistol in evidence *because it was the fruit of questioning in violation of his Fifth Amendment*

---

[1] The government may mean to suggest that the Sixth Circuit did not decide the scope of the public safety exception because it remanded the case for further factual findings. See Br. in Opp. 12 (court did not "resolv[e] whether the exception applied"). If so, the government is incorrect; the court of appeals set out the governing rule and, having done so, "remand[ed] the case to permit the district court to make the factual findings necessary to determine whether the public safety exception applies." 483 F.3d at 430.

[2] The government is incorrect in stating that "no circumstances in *Melvin* raised any specific concern on the part of the police about the presence of weapons in [the defendant's] truck"; law enforcement officers were aware that the defendant kept firearms in his vehicle. See 2007 WL 2046735, at *2.

rights" (872 F.2d at 595 (emphasis added)), a constitutional argument that parallels the one advanced by petitioner here.[3]

At bottom, there can be little doubt that the Eighth Circuit's understanding of *Miranda*'s public safety exception differs from that of the Fourth, Fifth, and Sixth Circuits, and that this case would have come out differently had it been decided by one of those courts. The government makes no serious contention to the contrary. For this reason alone, further review is warranted.

B. The Decision Below Departs From *Quarles*

In addition, as we also argue in the petition (at 13-17), the decision below departs from the rule of *Quarles* and substantially expands the public safety exception to *Miranda*. The Court in *Quarles* identified what it characterized as a "narrow" exception to *Miranda* that it applied where police officers "were confronted with the immediate necessity of ascertaining the whereabouts of a gun" and it would have been "untenable" to require the officers to choose "in a matter of seconds" whether or not to give *Miranda* warnings before trying to locate the weapon. 467 U.S. at 655, 657-658. That hardly describes the

---

[3] The government also asserts that the Fifth Circuit's analysis of the public safety exception was "inconclusive dictum" because the court ultimately held the disputed evidence admissible on an inevitable-discovery theory. Br. in Opp. 13. But the court's discussion of the point was neither casual nor inconclusive; it specifically noted the government's reliance "on the public safety exception" of *Quarles* and found that exception inapplicable before ruling the disputed evidence admissible on alternative grounds. 872 F.2d at 595.

situation in a case like this one, where law enforcement officers were the only ones who had access to the vehicle subject to search and where (as the government appears to concede, see Br. in Opp. 9) the vehicle could have been impounded and searched by the officers at their leisure (as it in fact subsequently was).[4]

In defending the decision below, the government accordingly is forced to maintain that "the facts of *Quarles* itself did not involve an emergency of the kind petitioner suggests is required." Br. in Opp. 6. That argument, however, disregards the considerations that the *Quarles* Court described as crucial to application of the public safety exception. "So long as the gun [in *Quarles*] was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to

---

[4] There is no basis for the government's assertion that the search in this case "involved some urgency." Br. in Opp. 7. See Pet. App. 9a-10a (Gruender, J., concurring) ("There was no evidence * * * supporting the necessity of an immediate search or continued search of the vehicle by the officers, either because of some immediate safety concern or because the vehicle was to be left unsecured by the roadside where the public might gain access to any weapon left in it. Because Liddell was arrested for driving while barred, there was no immediate danger that Liddell would be allowed to return to his car where he might have access to a hidden weapon. Furthermore, there was no evidence that the officers could not safely impound and tow Liddell's car in order to conduct a search of it at a later time."). The court of appeals' decisions cited by the government as favoring its position on this point (Br. in Opp. 7-8) offer it no support; those cases involved searches of the *persons* of arrested suspects, where there was an immediate need to conduct the search and remove dangerous items from the suspects' possession and control.

public safety: an accomplice might make use of it, a customer or employee might later come upon it." 467 U.S. at 657. The arresting officer in *Quarles* therefore "needed an answer to his question * * * to insure that further danger to the public did not result from the concealment of the gun in a public area." *Ibid.* The government's less urgent characterization of *Quarles* turns in large part on Justice Marshall's dissenting account of the record in that case (see Br. in Opp. 6-7), but the government omits Justice Marshall's understanding of the *actual holding* in *Quarles*: "The majority's analysis rests on the factual assumption that the public was at risk during Quarles' interrogation." 467 U.S. at 675 (Marshall, J., dissenting). Here, of course, no one had access to petitioner's car during his interrogation.

The decision below accordingly works a significant departure from the rule of *Quarles*. This Court held in *Quarles* (as did the Fourth, Fifth, and Sixth Circuits in their subsequent decisions applying the *Quarles* rule) that an exception to *Miranda* is warranted only when there are exigent circumstances and an urgent need for immediate questioning to preserve the public safety. The Eighth Circuit, in contrast, eliminated the immediacy and exigency elements from this test, holding simply that "the risk of police officers being injured by the mishandling of unknown firearms or drug paraphernalia provides a sufficient public safety basis to ask a suspect who has been arrested and secured whether there are weapons or contraband in a car or apartment that the police are about to search." Pet. App. 5a. Because such a risk of injury is present in virtually all searches, the Eighth Circuit's rule vastly expands the range of circumstances in which law enforcement

officers may dispense with the requirements of *Miranda*.

The government denies that this is so because, in this case, officers had discovered a firearm before questioning petitioner, giving them what the government identifies as special grounds for concern. Br. in Opp. 8 (citing Pet. App. 5). But as we showed in the petition (at 17 & n.4), it will almost always be the case that law enforcement officers have reason to suspect that they may come across a firearm or other dangerous item during the search of a home or vehicle. Under the Eighth Circuit's rule, that possibility triggers the public safety exception. The government makes no response to this point. But if the rule of *Quarles* is to be expanded in such a dramatic fashion, this Court, and not the Eighth Circuit, should be the one to take that step.

C. This Case Presents An Appropriate Vehicle With Which To Address The Question Presented

Finally, the government is wrong in contending that review should be denied because petitioner would be unable to withdraw his guilty plea even if he prevails in this Court on the public safety exception issue. Br. in Opp. 13. The statement elicited from petitioner by police questioning – that he knew there was a gun in the car he was driving, but that it was not his weapon – was central to the felon-in-possession charge against him. Indeed, petitioner entered a conditional guilty plea after denial of his suppression motion, and the only issue he presented on appeal was the admissibility of his statement to the arresting officer. See Pet. App. 2a-3a. There accordingly is every reason to believe that exclusion of

the statement "would have had a material effect on the defendant's decision to plead guilty" (*United States* v. *Leake*, 95 F.3d 409, 420 n.21 (6th Cir. 1996)), which the government recognizes to be the controlling test. Br. in Opp. 14.

In fact, this case is an ideal vehicle with which to resolve the question presented. The facts are undisputed and the record is simple. See Pet. App. 2a, 9a-10a. And those facts present the paradigm of the situation on which the courts are in conflict: At the time he was subject to questioning, petitioner was handcuffed and in custody, he presented no threat to anyone, and no one other than law enforcement officers had access to the vehicle subject to search. See *id.* at 9a. This Court should address the recurring question whether the dictates of *Miranda* may be disregarded in such circumstances.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN M. KAHAN
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

NOVEMBER 2008